

employee can work and refuses to do so, citing Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), and Swickard v. Meadowbrook Manor, 26 Kan. App. 2d 144, 979 P.2d 1256 (1999), where the court found that an employee was required to make an affirmative effort to fill an offered accommodated job. In both Foulk and Swickard, the matter had gone to regular hearing before being appealed regarding a claimant's entitlement to temporary total disability benefits.

In this instance, the matter is on appeal from a preliminary hearing.

K.S.A. 1999 Supp. 44-551(b) provides that the Appeals Board shall not review a pending preliminary hearing order entered by an administrative law judge unless it is alleged that the administrative law judge exceeded his or her jurisdiction in granting or denying the relief requested. K.S.A. 1999 Supp. 44-534a provides certain issues which shall be considered jurisdictional and subject to review by the Appeals Board, including:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

K.S.A. 1999 Supp. 44-534a also grants the administrative law judge the authority to award or deny temporary total disability compensation from a preliminary hearing, pending a full hearing on the claim.

Respondent argues in its brief that "the Board has a policy against reviewing preliminary decisions of ALJs"

The Board has no policy against reviewing preliminary decisions of administrative law judges. The Board's authority to review administrative law judges' preliminary decisions is controlled by statute. The legislature has mandated that the Appeals Board will not consider issues dealing with a claimant's entitlement to temporary total disability compensation when on appeal from preliminary hearings unless jurisdictional issues are in dispute. As no jurisdictional issues exist in this instance, then K.S.A. 1999 Supp. 44-551 and K.S.A. 1999 Supp. 44-534a dictate that this matter be dismissed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the appeal of the respondent in the above matter should be, and is hereby, dismissed, and the

Order of Administrative Law Judge Bryce D. Benedict dated March 9, 2000, remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of May 2000.

BOARD MEMBER

c: Roger D. Fincher, Topeka, KS
Kevin J. Kruse, Overland Park, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director